(2)

No. 031496 APR 19 2004

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

Meredith T. Raney, Jr.,

Petitioner,

v.

Allstate Insurance Company, Allstate Floridian Insurance Company, Ocala Women's Center, Inc., Aware Woman Center For Choice, Inc., Edward W. Windle, Jr., Patricia Baird Windle, James S. Pendergraft,M.D., and Manhattan Magnolia, Corp.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

SUPPLEMENTAL APPENDIX

Christopher F. Sapp
Petitioner's Counsel of Record
1323 Wilderness Lane
Titusville, Fl 32796
(321) 268-8758

Supplemental Appendix Table

Appendix F . . . . . **1a(s)**
Report and Recommendation of U.S. Magistrate Judge in the Middle District of Florida, Ocala Division, filed September 12, 2003.

1a(s)
FILED
2003SEP12 PM 7:41
CLERK US DISTRICTCOURT
OCALA FLORIDA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

MEREDITH T. RANEY, JR.,

Plaintiff,

v. **Case No. 5:02-cv-372-Oc-10GRJ**

ALLSTATE INSURANCE COMPANY, ALLSTATE FLORIDIAN INSURANCE COMPANY, OCALA WOMEN'S CENTER, INC., AWARE WOMAN CENTER FOR CHOICE, INC., EDWARD W. WINDLE, JR., PATRICIA BAIRD WINDLE, JAMES S. PENDERGRAFT, M.D., and MANHATTAN MAGNOLIA CORP.,

Defendants.

REPORT AND RECOMMENDATION[1]

Pending before the Court are: (1) Defendants Allstate Insurance Company and Allstate Floridian Insurance Company's (collectively referred to as "Allstate") Motion to Dismiss Plaintiff's Complaint (Docs. 9&10) (2) Defendants

---

[1]Specific written objections may be filed in accordance with 28 U.S.C. (636, and Rule 6.02, Local Rules, M.D.Fla., within ten (10) days after service of this report and recommendation. Failure to file timely objections shall bar the party from a *de novo* determination by a district judge and from attacking factual findings on appeal.

Manhattan Magnolia Corp. ("Manhattan"), Aware Woman Center For Choice, Inc. ("Aware"), Edward W. Windle, Jr. ("E. Windle"), and Patricia Baird Windle's ("P. Windle") Motion to Dismiss (Doc. 20 & 21), and (3) Defendants Ocala Women's Center, Inc. ("OWC)" and James S. Pendergraft, M.D.'s ("Dr. Pendergraft") Motion to Dismiss and Memorandum of Law. (Doc. 52.) Plaintiff Meredith T. Raney ("Raney") has filed responses to the Motion to Dismiss (Docs. 32, 33 & 57) and, accordingly, the motions to dismiss are ripe for decision. For the reasons discussed below, each of the Defendants' motions to dismiss is due to be **GRANTED**.

1. INTRODUCTION

This case involves claims by Plaintiff against the eight named Defendants for violation of the Racketeer Influenced and Corrupt Organizations Act. ("RICO") and for malicious prosecution. The relvant facts, as alleged in the Complaint, reveal the following details.

During the time relevant to the claims in the Complaint, Plaintiff was engaged in various anti-abortion activities in the Central Florida area. As a result of these activities, certain abortion clinics filed federal lawsuits against Plaintiff under *inter alia* the federal law known as FACE[2], alleging that Plaintiff had committed intentional or criminal acts at the abortion clinics including threatening and stalking the owners of the clinics, trespassing in the property of the abortion clinics and violating "buffer zones." Plaintiff alleges that three such lawsuits were filed against him. The first lawsuit was filed against Plaintiff by Dr. Pendergraft and OWC on December 10, 1998 in the Ocala Division of this Court and styled *Ocala Women's Center, Inc. and James S. Pendergraft,*

---

[2]18 U.S.C. §248.

M.D. v. Meredith Trotter Raney, et al., case no. 5:98-cv-371-Oc-10 (the "Ocala Case"). The second lawsuit was filed by P. Windle, E. Windle and Aware on January 4, 1999 in the Orlando Division of the Middle District and is styled *Aware Woman Center For Choice, Inc., Patricia Windle and Edward Windle, et al. v. Meredith Trotter Raney, Jr., et al.*, case no. 6:99-cv-5-Orl (the "Orlando Case"). The thirds case was filed by Manhattan, Aware and E. Windle on March 2, 1999 in the West Palm Division of the Southern District of Florida and is styled *Manhattan Magnolia Corporation, Aware Woman Center For Choice, Inc., Edward Windle, et al. v. Meredith trotter Raney, Jr., et al.*, case no. 99-8164 (the "West Palm Case").

As a result of Ocala, Orlando and West Palm Cases (collectively the "Federal Clinic Lawsuits"), Allstate - who insured Plaintiff under a homeowner's policy - was called upon to determine whether the claims in the Federal Clinic Lawsuits were covered under the policy. As is typical when claims are filed against an insured, Allstate issued a reservation of rights letter detailing Allstate's position with regard to coverage of the claims. In addition to issuing a reservation of rights letter, Allstate initiated a declaratory judgment action in state court requesting a judicial declaration that it did not owe Plaintiff a duty to defend or indemnify him with regard to the Federal Clinic Lawsuits.

Subsequently, each of the Federal Clinic Lawsuits was dismissed.[3] In view of the fact that the Federal Clinic Lawsuits had been dismissed against Plaintiff, the necessity for a declaration from the Court as to whether Allstate had a duty to defend or a duty to indemnify the Plaintiff was no longer

---

[3] The Ocala Case was dismissed on December 17, 1999 and the Orlando Case and the West Palm Case were dismissed on September 1, 1999 and July 14, 2000, respectively.

required and, accordingly, Allstate voluntarily dismissed the state court declaratory judgment action.

Plaintiff alleges that each of the four specified suits were filed maliciously and without any reasonable probability of success and, therefore, asserts that each party listed in Plaintiff's business, which allegedly provided assistance to pregnant women and counseling to people concerned with the practice of abortion. Plaintiff alleges that by writing to Allstate inquiring about possible settlement, Roy Lucas ("Lucas") the attorney representing the plaintiffs in the Federal Clinic Lawsuits, guilefully informed Allstate that his clients would sue Plaintiff if Allstate would support such suits. According to Plaintiff, Allstate's decision to reply with a reservation of rights letter, rather than an immediate denial of coverage, signaled to Lucas that Allstate would compensate the other members of the purported conspiracy for filing the suits. Plaintiff contends that Allstate's actions were motivated by a desire to impede Plaintiff's anti-abortion activities.

Under Plaintiff's theory of the case, insurance companies - such as Allstate - are the primary beneficiaries of the abortion industry, as each fetus aborted prevents insurers from having to pay healthcare expenses that would otherwise accrue during childhood of the non-aborted individual. Plaintiff concludes that the filing of the Federal Clinic Lawsuits, in conjunction with Allstate's state court declaratory judgment action, evidence acts of a financially-motivated enterprise created to destroy Plaintiff's anti-abortion counseling business.

With respect to the federal cause of action under RICO each of the Defendants argue in their respective motions, that the RICO claims are defective and should be dismissed because Plaintiff has failed to allege: (1) facts demonstrating cognizable predicate acts, and (2) facts capable of

demonstrating the existence of either a pattern of racketeering activity or an enterprise, both of which must be established to maintain a RICO cause of action.

In addition, Allstate contends that Plaintiff's RICO claim is barred by the McCarran-Ferguson Act, which provides that federal law should not "be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance."[4]

With regard to the malicious prosecution claims the Defendants attack the sufficiency of these claims, and two of the Defendants, alternatively request that the Court decline supplemental jurisdiction over the state law malicious prosecution claims, should the Court decide to dismiss the federal RICO claims.

II. MOTION TO DISMISS STANDARD

In passing on a motion to dismiss under Rule 12(b)(6), the Court is mindful that "[d]ismissal of a claim on the basis of barebones pleadings is a precarious disposition with a high mortality rate."[5] A complaint should not be dismissed for failure to state a claim unless it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.[6] The threshold of sufficiency that

---

4 15 U.S.C. §1012(b)

5 International Erecters, Inc. v. Wilhoit Steel Erectors & Rental Servs., 400 F.2d 465, 471 (5th Cir. 1968)

6 Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-02 (1957). See also, Cook & Nichol, Inc. v. The Plimsoll Club, 451 F.2d 505, 506 (5th Cir. 1971 ("a motion to dismiss for failure to state a claim should not be granted unless it appears to a certainty that the plaintiff would not be entitled to recover under any state of acts which could be proved in support of his claim").

a complaint must meet to survive a motion to dismiss is exceedingly low.[7] A complaint is sufficiently pled "if it shows that the plaintiff is entitled to any relief which the Court can grant, regardless of whether it asks for the proper relief."[8] Also, a court must accept a plaintiff's well-pled facts as true and construe the complaint in the light most favorable to the plaintiff.[9]

III. DISCUSSION

Because the motions filed by Allstate, Manhattan, Aware, E. Windle, P. Windle, OWC and Dr. Pendergraft all generally assert the same grounds regarding dismissal of the RICO claims, the Court will address the sufficiency of the RICO claims as it applies to all of the Defendants.

The RICO Act, 18 U.S.C. §1961 *et seq.*, provides a civil casue of action where the following four elements are apparent: (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering behavior."[10]

---

[7] See Ancata v. Prison Health Servs., 769 F.2d 700, 703 (11th Cir 1985) (citation omitted).

[8] Dortschav v. National Mut. Ins. Co., 246 F.2d 221 (5th Cir. 1957) (emphasis added).

[9] See Scheuer v. Rhodes 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed. 2d 90 (1974); Howry v. Nisus, Inc., 910 F. Supp. 576 (M.D. Fla. 1995)

[10] Durham v. Business Management Associates, 847 F.2d 1505, 1511 (11th Cir. 1988) (citing Sedima S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985)).. See 19 U.S.C. 1964 (c) which reads as follows: "Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States District Court and shall recover threefold the damages he sustains and the cost of the suit, including reasonable attorney's fee."

A pattern of racketeering activity, as defined in 18 U.S.C. §1961(5), requires at least two distinct but related predicate acts of "racketeering activity" within a 10 year period. [11] "Racketeering activity" is defined under RICO as an act violating any of the criminal statutes listed in 18 U.S.C. §1961(1). RICO's list of racketeering activities includes "any act or threat involving . . . .extortion . . . . which is chargeable under State law and punishable by imprisonment for more than one year" and " any act which is indictable under any of the following provisions of title 18 United States Code . . . section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering) . . ."

When addressing the sufficiency of a RICO claim on a motion to dismiss, as here, the Court must determine whether or not the plaintiff has "allege[d] facts sufficient to support each of the statutory elements for at least two of the predicate acts." [12] Thus, as a first step the Plaintiff must allege at least two predicate acts. A failure to do so would render the RICO claim subject to dismissal.

In the Complaint, Plaintiff alleges that the predicate acts include: (1) "acts and/or threats of extortion against the Plaintiff , utilizing acts and/or threats of malicious prosecution [which is] chargeable under state law and punishable by imprisonment for more than one year."; (2) "the obstruction of interstate commerce by extortion and/or attempts and/or conspiracy to commt extortion . . . in violation of 18 U.S.C. §1951." and (3) "travel in interstate commerce and the use of the United States Mail with the intent to commit crimes to further acts of extortion and/or to promote, manage, establish, carry on or facilitate the promotion, management,

---

[11] See 18 U.S.C. §1961(5)

[12] Republic of Panama v. BCCI Holdings, 119 F.3d 935, 949 (11th Cir. 1997)

establishment, or carrying on of extortion, . . . in violation of 18 U.S.C. §1952." [13] Thus, as framed by Plaintiff in his Complaint, the predicate acts are premised on: (1) extortion under state law, (2) extortion under the Hobbs Act, 18 U.S.C. §1951, and (3) use of the mails and travel in interstate commerce in aid of the alleged extortion. It is evident, however, from a complete review of the Complaint, that the sole factual foundation for the predicate acts under RICO, is the allegedly malicious prosecution of the three federal lawsuits by the Defendants. There is no allegation by Plaintiff that the Defendants committed any other predicate acts, which are unrelated to the filing and prosecution of the three federal lawsuits. Therefore, the determination of whether the malicious prosecution of the Federal Clinic Lawsuits, can serve as the basis for a civil RICO claim is pivotal to resolution of the pending motion. As explained below, for at least two reasons, the malicious prosecution of the three federal lawsuits - even if deemed to be true - is insufficient as a matter of law, to establish the necessary predicate acts to support a RICO claim.

Turning first to Plaintiff's claim that the malicious filing of the three federal lawsuits violates the Hobbs Act - and thus constitutes a predicate act under RICO - this issue has been squarely addressed by the Eleventh Circuit in United States v. Pendergraft. [14] In Pendergraft the Eleventh Circuit observed that a number of courts have held that " a threat to file a civil lawsuit, even if made in bad faith, is not "wrongful" within the meaning of the Hobbs Act." [15] The Court went on to reason that where a lawsuit is filed for extortionate reasons, the claim is essentially one for malicious prosecution.

---

13 Doc. 1, ¶2.

14 297 F.3d 1198, 1205 (11th Cir. 2002).

15 *Id.* (Citations omitted).

According to Pendergraft, the courts that have found it is not a violation of the Hobbs Act to file a lawsuit in bad faith, "have recharacterized the extortion charges as actions for malicious prosecution and have held that malicious prosecution is not a RICO predicate act." [16] For this reason, the court in Pendergraft held that, as a matter of law, the filing of civil litigation in bad faith and even with the intent to commit or to attempt to commit extortion, cannot serve as the basis for a criminal prosecution based on the Hobbs Act. [17]

Accordingly, under Pendergraft, even accepting as true Plaintiff's allegations that Defendants maliciously prosecuted the Federal Clinic Lawsuits in bad faith and to extort Plaintiff, these allegations are legally insufficient to establish a violation of the Hobbs Act and, therefore, Plaintiff has failed to establish a predicate act under RICO. [18]

Secondly, as the Supreme Court recently held in Scheidler v. National Organization for Women, [19] in order to properly establish a RICO claim based on the predicate act of extortion - either under the Hobbs Act or under state law

---

16 *Id.*

17 One of the reasons the Pendergraft panel was convinced that malicious prosecution of civil cases should not be used to trigger criminal charges under the Hobbs Act was because "allowing litigants to be charged with extortion would open yet another collateral way for litigants to attack one another." 297 F.3d at 1207.

18 Consistent with the Eleventh Circuit's holding in Pendergraft, a number of other courts similarly have found that the initiation of a law suit cannot constitute a predicate act under RICO, even if the law suit is malicious. *See, e.g.* Ippolito v. State of Florida, 824 F.Supp. 1562, 1575 (M.D.Fla. 1993) ("the initiation of a law suit cannot constitute a predicate act, even if that law suit is malicious"); Vemco, Inc. v. Camardella, 23 F.3d 129, 134 (6th Cir. 1994) ("A threat of litigation . . . does not constitute extortion.").

19 537 U.S. 393, 123 S.Ct. 1057, 154 L.Ed. 2d 991 (2003)

extortion statutes [20] - it must be established that the RICO defendant *obtained* or *attempted to obtain property from the plaintiff.* The Scheidler court found that to "obtain or attempt to obtain" means to acquire the property from the plaintiff so that the defendant has acquired "something of value" over which they "could exercise, transfer, or sell." [21] Conversely, "obtain or attempt to obtain" does not mean simply interfere with, disrupt or even deprive someone of their property rights.

Here, Plaintiff's Complaint is fatally flawed because Plaintiff does not allege that the Defendant obtained or attempted to obtain any property from him. Instead, Plaintiff merely alleges that as a result of the filing and malicious prosecution of the Federal Clinic Lawsuits, "Defendants' racketeering activities have decreased the business of and/or increased the expense and difficulty of doing business by the Plaintiff. [22] Like the unsuccessful plaintiff abortion clinics in Scheidler, Plaintiff, here, has at best alleged that the actions of the Defendants interfered with the rights and business interest of Plaintiff. This shortcoming is fatal to the pursuit of a claim against the Defendants under RICO because, in the absence of an allegation that property was obtained by the Defendants,

---

[20] Because the Supreme Court recognized in Scheidler "that for a state offense to be an 'act or threat involving . . .extortion . . . which is chargeable under State law,' as RICO requires [see 18 U.S.C. §1961(1)), the conduct must be capable of being generically classified as extortionate." Further, "generic extortion is defined as 'obtaining something of value from another with his consent induced by the wrongful use of force, fear, or threats . . ." 123 S.Ct. at 1068. Thus, the failure to allege that Defendants obtained or attempted to obtain Plaintiff's property, is equally applicable to Plaintiff's reliance upon state law extortion claims as the basis for the predicate acts.

[21] *Id.* 123 S.Ct. At 1066

[22] Doc. 1 ¶47.

Plaintiff cannot establish that Defendants committed any predicate acts. Plaintiff cannot establish that there was a pattern of racketeering behavior, and, accordingly, Plaintiff's RICO claim is due to be dismissed with prejudice. [23]

Lastly, with regard to Plaintiff's state law claims for malicious prosecution, [24] because there are no federal claims remaining, pursuant to 28 U.S.C. § 1367(c)(3), the Court may decline to exercise supplemental jurisdiction. In view of the fact that all of the remaining claims involve issues that will be solely resolved in accordance with state law, the Court should exercise its discretion and decline to exercise supplemental jurisdiction over the malicious prosecution claims in counts II, III, IV and V of the Complaint. Plaintiff, may of course, pursue the claims in an appropriate state court subject to the tolling provisions in 28 U.S.C. §1367(d).

---

[23] Because the defect in Plaintiff's RICO claim with regard to his failure to establish the necessary predicate acts is not a curable defect - but rather is fatal to the RICO claim - it is unecessary for the Court to address Allstate's argument that the RICO claim is bared by the McCarran-Ferguson Act or to address the other arguments by Defendants that the RICO claim is deficient because of lack of participation by some defendants and because of deficiencies with regard to alleging an "enterprise" under RICO.

[24] The Court's decision to decline supplemental jurisdiction to permit pursuit of the malicious prosecution claims in state court is not an implied or tacit acknowledgment that the Court has found that the claims state a cause of action against any of the Defendants.

IV. RECOMMENDATION

For the foregoing reasons, it is respectfully **RECOMMENDED** that: (1) Defendant Allstate's Motion to Dismiss be **GRANTED** (Doc. 9), (2) Defendants Manhattan, Aware, E. Windle, and P. Windle's Motion to Dismiss (Doc.20) be **GRANTED**, (3) Defendants OWC and Dr. Pendergraft's Motion to Dismiss (Doc. 52) be **GRANTED**, (4) Count I of the Complaint, alleging a violation of RICO, be **DISMISSED with prejudice**, and (5) Counts II, III, IV, and V, of the Complaint, which purport to allege claims for violation of state law only, be **DISMISSED without prejudice** pursuant to 28 U.S.C. §1367(c) subject to the right to pursue Counts II, III, IV and V, of the Complaint in the appropriate state forum and subject to the tolling provisions provided in 28 U.S.C. §1367(d).

IN CHAMBERS in Ocala, Florida on this 12th day of September, 2003.

/s/_____
GARY R. JONES
United States Magistrate Judge

Copies to:

The Honorable Wm. Terrell Hodges
Senior United States District Judge

Counsel of Record